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KEITH JACKSON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEITH JACKSON,

Defendant.

Case No. 3:14-CR-00196 (CRB)

**DEFENDANT KEITH JACKSON'S
NOTICE OF MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS COUNTS 152,
158, 159, 165, 166, 171, 204, 210, AND
222**

Date: November 12, 2014

Time: 10:00 a.m.

Magistrate Judge: Hon. Charles Breyer

Location: Courtroom 6, 17th Floor

NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 12, 2014, at 10:00 a.m., or as soon thereafter as the matter may be heard, Defendant, through counsel, will and hereby does move for an order dismissing the Counts 152, 158, 159, 165, 166, 171, 204, 210, and 222 in the Superseding Indictment pursuant to Federal Rule of Criminal Procedure 12.

This Motion is based on this Notice of Motion and the attached Memorandum of Points and Authorities, the files and records in this case, and any other evidence or argument that may properly be presented to the Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Counts 152, 158, 159, 165, 166, 171, 204, 210, and 222 in the Superseding Indictment (“Indictment”), charging Mr. Jackson with violations of 18 U.S.C. §§ 922(a)(1), 371, and 1958, should be dismissed because the government fails to allege essential elements of the charged offenses. Count 222 should be dismissed for the additional reasons that the government has alleged nothing more than preliminary discussions insufficient to state an agreement, and failed to allege defendants intended to deal or import firearms without a license.

II. BACKGROUND

On or about July 24, 2014, the Grand Jury returned a superseding Indictment charging Mr. Jackson with, among other charges, multiple violations of 18 U.S.C. § 922(a)(1), one violation of 18 U.S.C. § 371, and one violation of 18 U.S.C. § 1958.

A. Counts 152, 158, 159, 165, 166, 171, 210—18 U.S.C. § 922(a)(1)

Counts 152, 158, 159, 165, 166, 171, and 210 all allege violations of 18 U.S.C. § 922(a)(1), engaging in the business of dealing firearms without a license, but are devoid of any facts:

- Count 152 alleges that on or about May 6, 2013, Mr. Jackson willfully engaged in the business of dealing firearms with co-defendant Brandon Jackson. (Indictment at 44.)
- Count 158 alleges that on or about June 24, 2013, Mr. Jackson willfully engaged in the business of dealing firearms with co-defendants Brandon Jackson and Marlon Sullivan. (*Id.* at 45-46.)
- Count 159 alleges that on or about June 25, 2014, Mr. Jackson willfully engaged in the business of dealing firearms with co-defendants Brandon Jackson and Marlon Sullivan. (*Id.* at 46.)
- Count 165 alleges that on or about August 5, 2013, Mr. Jackson willfully engaged in the business of dealing firearms with co-defendant Brandon Jackson. (*Id.* at 49.)
- Count 166 alleges that on or about August 8, 2013, Mr. Jackson willfully engaged in the business of dealing firearms with co-defendant Brandon Jackson. (*Id.*)

- 1 • Count 171 alleges that on or about August 26, 2013, Mr. Jackson willfully engaged in the
2 business of dealing firearms with co-defendants Brandon Jackson and Marlon Sullivan.
3 (*Id.* at 51.)
- 4 • Count 210 alleges that on or about March 20, 2014, Mr. Jackson willfully engaged in the
5 business of dealing firearms with co-defendant Barry House. (*Id.* at 64.)

6 **B. Count 222; 18 U.S.C. § 371**

7 Count 222 alleges that Mr. Jackson, along with co-defendants Leland Yee and the late
8 Wilson Lim, conspired and agreed to engage in the business of selling firearms in violation of
9 18 U.S.C. § 922(a)(1) and to knowingly import or bring firearms into the United States in
10 violation of 18 U.S.C. § 922(l), all in violation of 18 U.S.C. § 371. (Indictment at 80.) The
11 supposed conspiracy is alleged to have spanned a mere eleven days from on or about March 4,
12 2014, to March 15, 2014. (*Id.*)

13 **C. Count 204; 18 U.S.C. § 1958**

14 Count 204 charges Mr. Jackson for his alleged role in a fictitious murder for hire scheme
15 in violation of 18 U.S.C. § 1958. (Indictment at 62.) The Indictment does not allege whether Mr.
16 Jackson is a principal, or an aider and abettor. It is not clear which of the three defendants is
17 alleged to have “used a facility in interstate commerce” or possibly to have “caused another to use
18 a facility of interstate commerce” with the intent to murder a fictional victim conjured by an agent
19 of the Federal Bureau of Investigation. In exchange for the fake murder, the co-defendants were
20 purportedly promised \$25,000. (*Id.*)

21 **III. LEGAL STANDARD**

22 The Constitution requires that defendants in all criminal cases be provided sufficient
23 information regarding the offense they are accused of committing and when it occurred so that
24 they may adequately prepare a defense. *See Russell v. United States*, 369 U.S. 749, 763-64
25 (1962); Sixth Amendment of the United States Constitution (“the accused shall ... be informed of
26 the nature and cause of the accusation”). The Ninth Circuit has held that in order to withstand a
27 motion to dismiss, an indictment must allege each element of the charged offense with sufficient
28 detail (1) to enable the defendant to prepare his defense; (2) to ensure him that he is being

1 prosecuted on the basis of the facts presented to the grand jury; (3) to enable him to plead double
 2 jeopardy; and (4) to inform the court of the alleged facts so that it can determine the sufficiency
 3 of the charge. *United States v. Bernhardt*, 840 F.2d 1441, 1445 (9th Cir. 1988).

4 It is not sufficient to simply track the language of a statute. “Where the definition of an
 5 offence, ... includes generic terms, it is not sufficient that the indictment shall charge the offence
 6 in the same generic terms as in the definition; but it must state the species, – it must descend to
 7 particulars.” *Russell*, 369 U.S. at 765 (quotation omitted). This is especially important when the
 8 defendant is charged with violating broad statutes. *See United States v. Smolar*, 557 F.2d 13, 19
 9 (1st Cir. 1977) (the indictment should “state with particularity the theory on which it charges”
 10 that the defendant violated the statute).

11 An indictment that fails sufficiently to allege the elements of an offense must be
 12 dismissed. *See Fed. R. Crim. P. 12(b)(3)(B)* (authorizing motions to dismiss an indictment for “a
 13 defect in the indictment”); *see United States v. Fiander*, 547 F.3d 1036, 1038 (9th Cir. 2008).
 14 “[A]n indictment’s complete failure to recite an essential element of the charged offense is not a
 15 minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of
 16 the indictment.” *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). The Fifth
 17 Amendment entitles defendants not to be charged with a felony except on the basis of facts that
 18 satisfied a grand jury that they should be charged. *See United States v. Tsinhnahjinnie*, 112 F.3d
 19 988, 992 (9th Cir. 1997). Thus, an indictment should be dismissed where it fails “to ensure that
 20 the defendant is prosecuted only on the basis of the facts presented to the grand jury.” *Du Bo*,
 21 186 F.3d at 1179.

22 **IV. THE GUN CHARGES SHOULD BE DISMISSED BECAUSE THE**
 23 **GOVERNMENT FAILS TO ALLEGE MR. JACKSON WAS**
 24 **“ENGAGED IN THE BUSINESS OF DEALING FIREARMS”**
(COUNTS 152, 158, 159, 165, 166, 171, 210; 18 U.S.C. § 922(A)(1))

25 The Indictment fails to put Mr. Jackson on notice of the crime he allegedly committed. 18
 26 U.S.C. § 922(a)(1)(A) states that “it shall be unlawful for any person, except a licensed importer,
 27 licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing,
 28 or dealing in firearms or ammunition, or in the course of such business to ship, transport, or

1 receive any firearm or ammunition in interstate or foreign commerce.” *United States v. King*, 735
 2 F.3d 1098, 1104 (9th Cir. 2013). An aiding and abetting charge requires the government to prove
 3 Mr. Jackson (1) took an affirmative act in furtherance of the substantive offense, (2) with the
 4 intent of facilitating the offense's commission. *See Rosemond v. United States*, 134 S. Ct. 1240,
 5 1245 (2014); *Juan H. v. Allen*, 408 F.3d 1262, 1276 (9th Cir. 2005) (vacating double murder
 6 conviction where defendant lacked requisite knowledge and intent). To be “engaged in the
 7 business,” there are five sub-elements. A defendant must (1) “willfully” be (2) a person who
 8 devotes time, attention, and labor to dealing in firearms (3) as a regular course of trade or
 9 business (4) with the principal objective of livelihood and profit (5) through the repetitive
 10 purchase and resale of firearms. 18 U.S.C. § 921(a)(21)(C); 18 U.S.C. § 924(a)(1)(D).

11 Counts 152, 158, 159, 165, 166, 171, and 210 should be dismissed because the
 12 government’s barebones Indictment fails to allege a required element— that Mr. Jackson was
 13 “engaged in the business” of dealing firearms, or that Mr. Jackson aided or abetted co-defendants
 14 charged with the same offenses.

15 Here, the government has alleged nothing of substance, limiting its allegations to a date
 16 and language that copies the statutory text. As discussed above, however, the Indictment “must
 17 descend to particulars” in order to provide sufficient notice where the statute “includes generic
 18 terms.” *Russell*, 369 U.S. at 765 (quotation omitted); *Hamling v. U.S.*, 418 U.S. 87, 118 (1974)
 19 (“Where guilt depends ... upon [] a *specific identification of fact*, our cases have uniformly held
 20 that an indictment must do more than simply repeat the language of the criminal statute.”)
 21 (citation omitted). “The need for definiteness is greater when the ordinance imposes criminal
 22 penalties on individual behavior or implicates constitutionally protected rights than when it
 23 regulates the economic behavior of businesses.” *Nunez by Nunez v. City of San Diego*, 114 F.3d
 24 935, 940 (9th Cir. 1997) (citation omitted). Because 18 U.S.C. § 922(a) imposes criminal
 25 penalties and implicates the constitutionally protected right to bear arms, “a more stringent
 26 vagueness test” applies. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982);
 27 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) (burden on Second Amendment
 28 right to bear arms subject to heightened scrutiny).

1 The government has not alleged how much “time, attention or labor” Mr. Jackson spent
 2 on his alleged dealings, much less that such amount of “time, attention, and labor” is sufficient to
 3 allege Mr. Jackson is a “dealer.” Similarly, the government does not allege that Mr. Jackson
 4 intended to obtain his livelihood or profit primarily from gun sales, much less that such was his
 5 “predominant” motive. *See* 18 U.S.C § 921(a)(C)(22). To the contrary, the government alleges
 6 that Mr. Jackson’s primary occupation was as a political consultant. The government also fails to
 7 allege that dealing firearms was Mr. Jackson’s “regular course of trade or business,” or that he
 8 had any “guns on hand” or was any more “ready and able to procure them” than the average
 9 person who has the means to walk into a gun shop. *See King*, 735 F.3d at 1107 n. 8 (quoting
 10 *United States v. Nadirashvili*, 655 F.3d 114, 120 (2d Cir. 2011)).

11 The Indictment also fails to allege any particular alleged action or words by Mr. Jackson
 12 to demonstrate he “participate[d] in [the offense] as in something that he wishe[d] to bring
 13 about,” or took “action to make it succeed.” *See United States v. Campbell*, 702 F.2d 262, 265
 14 (D.C. Cir. 1983) (citing *Nye & Nissen v. U. S.*, 336 U.S. 613, 619 (1949)). Therefore to the extent
 15 Counts 152, 158, 159, 165, 166, 171, and 210 allege Mr. Jackson aided or abetted an offense, they
 16 should be dismissed.

17 These deficiencies are not trifles. The government seeks to imprison Mr. Jackson for the
 18 same conduct that millions of Americans engage in, supported by the full backing of the Second
 19 Amendment. To avoid the appearance—or worse, actual practice—of “arbitrary or
 20 discriminatory” enforcement, the government must explain within the context of this statute what
 21 it is Mr. Jackson can and cannot do. Because they have failed, Counts 152, 158, 159, 165, 166,
 22 171 and 210 should be dismissed. *Russell*, 369 U.S. at 765.

23 **V. THE WEAPONS TRAFFICKING CONSPIRACY CHARGE** 24 **SHOULD BE DISMISSED (COUNT 222; 18 U.S.C. § 371)**

25 Count 222 should be dismissed because the Indictment fails to allege a conspiracy to deal
 26 or import weapons. The government must establish (1) an agreement between two or more
 27 persons to violate 18 U.S.C. § 922(a)(1)(A) or § 922(l); (2) the defendant joined the conspiracy,
 28 knowing its purpose and intending to help accomplish that purpose; and (3) a member of the

1 conspiracy committed an overt act in furtherance of the conspiracy. Ninth Circuit Pattern Jury
 2 Instruction 8.20; *United States v. Arlt*, 252 F.3d 1032, 1038 (9th Cir. 2001) (“the indictment on a
 3 § 371 offense incorporates by reference the provisions of the specific substantive criminal statute
 4 involved as a “statutory element” of the conspiracy charge”).

5 The Superseding Indictment alleges a fantastical conspiracy whereby Senator Leland Yee,
 6 Keith Jackson, and Dr. Wilson Lim met with UCE-4599 three times and “discussed purchasing
 7 weapons from the Philippines to import into the United States.” Indictment at 80:21-23. UCE-
 8 4599 allegedly gave Senator Yee \$6,800 and a list of weapons for Dr. Lim, and gave Mr. Jackson
 9 a copy of a list of weapons to give to Dr. Lim. (*See Id.* at 80:24-81:1.) From these three meetings
 10 and a piece of paper, the government alleges a state senator, political consultant, and local dentist
 11 had the intent and the means to embark on a conspiracy to import a cache of weapons from the
 12 Philippines for resale in the United States. The government’s allegations fail to allege a
 13 conspiracy, overt acts, or conduct that would support a substantive violation of 18 U.S.C. §
 14 922(a)(1)(A) or 18 U.S.C. § 922(l). Therefore, Count 222 of the Indictment should be dismissed.

15 **A. The Government Fails to Allege a Conspiracy.**

16 The Indictment’s allegation of an eleven day conspiracy to import weapons from the
 17 Philippines fails to establish an agreement, or that the alleged co-conspirators committed overt
 18 acts in furtherance of the embryonic discussions. Beyond the conclusory statement that the
 19 defendants “conspired and agreed,” there are no allegations of any illegal plan to deal or import
 20 weapons. The first three alleged overt acts allege preliminary discussions in March 2014.
 21 (Indictment at 80:16-23.) The fourth and fifth alleged overt acts allege that on separate dates,
 22 Senator Yee and Mr. Jackson “accepted a list of weapons” to pass to Dr. Lim. (Indictment at
 23 80:24-81:1.) However, “it is not enough ... that they simply met, discussed matters of common
 24 interest, acted in similar ways, or perhaps helped each other.” Ninth Circuit Pattern Jury
 25 Instruction 8.20 (2010). There must be a “plan” to engage in illegal activity. *Id.*

26 *United States v. Jack*, where the court dismissed allegations of a similarly farfetched plot
 27 that was drawn in far greater detail than Count 222, is instructive. *See* No. 2:07-cr-00266 FCD
 28 DAD, 2010 U.S. Dist. LEXIS 121209 (E.D. Cal. Nov. 12, 2010). There, a group of Hmong

1 refugees was charged with conspiring to overthrow the Laotian government, in violation of
2 various substantive statutes, including 22 U.S.C. § 2778(c), which makes it a crime to import or
3 export “defense articles” without a license, and 18 U.S.C. § 844(d), which criminalizes most
4 interstate receipt or transport of explosives. The government alleged that “during formal and
5 informal meetings and conversations between various defendants they ‘discussed the acquisition
6 and transfer of military arms’,... participated in fund-raising activities in furtherance of the
7 conspiracy,... communicated and coordinated with a military force of insurgent troops within
8 Laos,” and “engaged in the procurement of military arms and negotiated the purchase of military
9 arms” for export from Thailand to Laos. The government also alleged defendants had already
10 received various firearms, including machine guns, rockets, and mines. *Jack*, 2010 U.S. Dist.
11 LEXIS 121209 at *7-8 (quoting in part superseding indictment). The overt acts included thirty-
12 eight communications, weapons examinations, monetary contributions, and allegations of
13 operations planning. *Id.* at *8-9.

14 Despite the numerous and detailed overt acts alleged, the court dismissed the indictment
15 as to those counts. “Given the unusual complexity of the charges and their diverse factual
16 underpinnings,” the general allegations were not specific as to the role of each defendant, thus
17 denying them the ability to prepare a defense. *Id.* at *49-50. The court was also troubled that, as
18 here, the indictment addressed charges relating to “firearms, explosives and ammunition that
19 never existed.” *Id.* at *51.

20 The court relied heavily on another instructive decision involving an international plot.
21 *See United States v. Lumsden*, 26 F. Cas. 1013, 1014 (S.D. Ohio 1856). There, a secret society
22 committed overthrowing the British government in Ireland was found not guilty of violating the
23 predecessor to the Neutrality Act where members discussed plans but took no further steps.
24 “Mere words, written or spoken, though indicative of the strongest desire and the most
25 determined purpose to do the forbidden act, will not constitute the offense.” *Id.* Where “there
26 was a good deal of talk about raising money and procuring arms, but nothing was ever
27 accomplished in regard to those objects,” the charge could not be sustained. *Id.* at 1018.

Here, as in *Jack and Lumsden*, the Indictment does not allege that the defendants intended to, or actually did, have a plan to pay for or acquire arms to import into the United States. The Indictment does not allege each defendant's role in the alleged conspiracy. Nor does the Indictment allege any terms of a deal, such as offers, price terms, quantities, delivery schedules, or distribution methods. There is simply no notice of the government's theory of how Defendants planned to actually import weapons into the United States from the Philippines for resale. Count 222 should be dismissed.

B. The Government Fails to Allege Defendants Would Not Have Complied with the Licensing Requirements of the Underlying Statutes.

Even if the government had properly alleged a conspiracy, Count 222 must be dismissed because the government cannot establish that the object of the alleged conspiracy was illegal. The government has not alleged, and cannot allege, that Defendants did not plan to obtain a federal license before importing or dealing weapons. *See* 18 U.S.C. § 922(a)(1)(A); 18 U.S.C. § 925(d). The “mere association of two or more persons to accomplish legal and possibly illegal goals, accompanied by discussions to promote those goals, but with no discernible direction toward either the legal or the illegal objectives” is not criminal conduct under 18 U.S.C. § 371. *United States v. Wieschenberg*, 604 F.2d 326, 336 (5th Cir. 1979). In *Wieschenberg*, the Fifth Circuit reversed convictions charging defendants with acting as foreign agents and conspiring to export munitions without a license in violation of 22 U.S.C. § 1934(c) and its successor statute, 22 U.S.C. § 2778(c), holding there was no overt act. The court found that the statutory licensing requirement created circumstances that “differ markedly from a situation in which the single object of an agreement or combination is illegal. The questioned conduct in this case could be either legal or illegal.” *Id.* at 331. Although the government produced evidence of months of meetings and telephone calls regarding a source of supply, customers, and routing payments through two countries, the court held that evidence was “as consistent with a plan to export with a license, a legal act, as it is with exportation without a license, an illegal act.” *Id.* at 332. Without evidence that anyone ever discussed exporting the navigational instruments without a license, the government failed to allege an overt act. *Id.* at 334. As the court explained:

1 “It is not enough for [the government] merely to establish a climate of activity
2 that reeks of something foul. The law requires proof that the members of the
3 conspiracy knowingly and intentionally sought to advance an illegal objective.
4 Involvement by individuals in a clandestine agreement that appears suspicious
5 may be ill advised or even morally reprehensible, but, without proof of an illegal
6 aim, it is not criminal.” *Id.* at 332.

7 Here, the government similarly fails to allege the defendants, who the government alleges
8 had been working together for just eleven days, did not intend to acquire a federal license before
9 dealing or importing weapons. Absent a plausible allegation of corrupt intent, allegations of
10 nascent business ventures do not plead a crime.

11 **C. The Government Failed to Plead the Elements of the**
12 **Underlying Substantive Offenses.**

13 Count 222 should be dismissed because the government failed to plead all the elements of
14 underlying substantive counts. *Du Bo*, 186 F.3d at 1179 (“[A]n indictment’s complete failure to
15 recite an essential element of the charged offense is not a minor or technical flaw subject to
16 harmless error analysis, but a fatal flaw requiring dismissal of the indictment.”); *United States v.*
17 *Kingrea*, 573 F.3d 186, 192 (4th Cir. 2009) (vacating conviction and dismissing indictment where
18 government omitted element of one of two underlying offenses, 7 U.S.C. § 2156, in conspiracy
19 charge). In *Kingrea*, the court rejected the government’s argument that to state a conspiracy
20 charge, it needed “only to set forth in the indictment the elements of a conspiracy.” 573 F.3d at
21 192. The court held that “the requirement that all elements of the offense be present in the
22 indictment” is not only an issue of notice under the Sixth Amendment but also “derives from the
23 Fifth Amendment, which requires that the grand jury have considered and found all elements to
24 be present.” *Id.* at 193 (quotation omitted). The failure to plead an element of the underlying
25 offense “failed to state an offense against the United States as the object of the conspiracy.” *Id.* at
26 193-194. “The [other] elements of [an] offense, as they were alleged in [Count I], do not by
27 themselves state any federal crime, nor do they show that the grand jury found all elements of any
28 federal crime.” *Id.* (citing *United States v. Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988)).

Here, the government has not pled the level of scienter required for a substantive violation of 18 U.S.C. § 922(a)(1). The statute requires the government to engage in the business of dealing firearms “willfully.” 18 U.S.C. § 924(a)(1)(D). The Indictment, however, omits the scienter entirely, alleging defendants conspired “to engage in the business of dealing in firearms, not being a licensed dealer within the meaning of Chapter 44, Title 18, United States Code, in violation of Title 18 United States Code, Section 922(a)(1).” The government cannot bootstrap its allegation that the defendants “knowingly and willfully conspired” since conspiracy is a separate crime with its own distinct scienter requirement, nor can the government rely on other counts in the Indictment alleging violations of § 922(a)(1)(A). *See United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991) (“each count in an indictment must stand on its own, and cannot base its validity on the allegations of any other count not specifically incorporated”).

As discussed above, the government fails to sufficiently plead other elements of 18 U.S.C. § 922(a)(1)(A) as well. There is no allegation that any defendant agreed to provide the weapons on the list, had access to firearms, or was “ready and able to procure them.” The defendants are not alleged to be professional firearms dealers and are not alleged to have ever dealt a firearm, or obtained their livelihood or profit primarily from gun dealing. The government also fails to allege, and cannot allege, that the defendants intended to deal firearms or import firearms without a license. *See* 18 U.S.C. § 922(a)(1)(A); 18 U.S.C. § 925(d).

VI. THE MURDER FOR HIRE CHARGE SHOULD BE DISMISSED (COUNT 204; 18 U.S.C. § 1958)

Count 204 should be dismissed because it fails to inform Mr. Jackson of the nature and elements of his role in a fictitious murder for hire scheme and fails to allege sufficiently all the essential elements. *Bernhardt*, 840 F.2d at 1445; *Du Bo*, 186 F.3d at 1179 (“[A]n indictment’s complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment.”). Section 1958 requires the government to allege that Mr. Jackson (1) used or caused another to use a facility in interstate commerce; (2) with the intent that a murder be committed; (3) as

1 consideration for the receipt of or promise to pay anything of pecuniary value. *See* 18 U.S.C. §
 2 1958; *United States v. Ritter*, 989 F.2d 318, 321 (9th Cir. 1993).

3 Aside from a date and dollar amount, the Indictment provides no other information. The
 4 Indictment (1) fails to identify the facility in interstate commerce; (2) fails to identify how
 5 Mr. Jackson used or caused another to use this facility with the intent to murder in exchange for
 6 something of pecuniary value; and (3) fails to identify the underlying murder statute he
 7 purportedly agreed to violate.

8 The government's failure to identify the facility of commerce is especially troubling given
 9 the wide, and disparate, range of instrumentalities that may satisfy this element. Section 1958
 10 defines a "facility of interstate or foreign commerce" to include "means of transportation and
 11 communication." 18 U.S.C. § 1958(b)(2). This statutory definition is so vague as to be almost
 12 meaningless. The instrument may be a car, a boat, a telephone, an airplane or two cans on a
 13 string between them, provided there is a sufficient connection to interstate commerce. Nor does
 14 the government allege how the facility was used. Failure to allege the actual facility utilized is
 15 not only a defect in notice, but creates the risk that what was presented to the grand jury will not
 16 be what is presented in this trial.

17 The Indictment also fails to allege the underlying murder statute Mr. Jackson allegedly
 18 agreed to violate, or its essential elements. The Indictment alleges that Mr. Jackson intended to
 19 "murder a fictitious victim in violation of California law." (Indictment at 62.) California,
 20 however, regulates "murder" in more than twenty ways, with different elements depending on the
 21 actual offense charged. *See* Cal. Penal Code § 187(a) ("Murder is the unlawful killing of a human
 22 being, or a fetus, with malice aforethought."); Cal. Penal Code § 189 (distinguishing between first
 23 degree and second degree murder); Cal. Penal Code § 190 (different penalties for capital murder,
 24 first degree murder, second degree murder); Cal. Penal Code § 190.03 (prescribing additional
 25 elements for a "hate crime" murder); Cal Penal Code § 190.2 (describing additional elements to
 26 prove special circumstances associated with certain first degree murder, including murder for
 27 financial gain, murder with a previous or concurrent conviction, murder by use of destructive
 28 device, murder while resisting arrest, murder of a state or federal peace officer, murder of a

1 firefighter, murder of a witness to a crime, murder of a prosecutor or judge, murder of a state or
2 federal official, murder by torture, lying in wait, murder based on various types of discrimination,
3 felony murder, murder by poison, murder of a juror, drive by murder, murder of a gang member).
4 The Indictment does not state which of these laws Mr. Jackson agreed to violate, rendering Count
5 204 void of an essential element.

6 CONCLUSION

7 For all of the reasons stated above, Defendant's motion to dismiss Counts 152, 158, 159,
8 165, 166, 171, 204, 210, and 222 in the Indictment should be granted.

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10 Dated: October 3, 2014

Respectfully submitted,

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